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Order F13-23

BRITISH COLUMBIA LOTTERY CORPORATION

Elizabeth Barker
Adjudicator

November 7, 2013

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Summary: This is a rehearing of part of Order F11-28, which concerned email correspondence between BCLC's then chief executive officer and its former director and chair. The former director and chair argued that certain email correspondence requested by an applicant did not fall within the scope of FIPPA, so FIPPA did not apply. The adjudicator found that BCLC had "custody" of the responsive records within the meaning of s. 3(1) of FIPPA, so the records were within the scope of FIPPA. The adjudicator ordered BCLC to comply with the terms of Order F11-28.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)

Authorities Considered: B.C.: Order F11-28, 2011 BCPIC No. 34; Order F10-13, [2010] B.C.I.P.C.D. No. 22; Order 02-30, [2002] B.C.I.P.C.D. No. 30; Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 03-14, [2003] B.C.I.P.C.D. No. 14; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order No. 308-1999, [1999] B.C.I.P.C.D. No. 21; Order No. 115-1996, [1996] B.C.I.P.C.D. No. 42. **Ont.:** Order PO-3009-F, [2011] O.I.P.C. No. 152.

Cases Considered: *British Columbia (Ministry of Small Business, Tourism & Culture) v. British Columbia (Information & Privacy Commissioner)*, 2000 BCSC 929; *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 S.C.C. 53; *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

INTRODUCTION

[1] This inquiry concerns whether certain emails between the then chief executive officer ("CEO") of BC Lottery Corporation ("BCLC") and the person, who was BCLC's former chair and director ("Third Party"), fall within the scope of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

DISCUSSION

[2] **Background**—This is a judicially ordered rehearing of part of Order F11-28,[1] which concerned email correspondence between the CEO and the Third Party.

[3] The applicant is a journalist who requested access to correspondence between the Third Party and BCLC's board members, president, chief executive officer and vice president. The responsive records are 47 pages of emails between the CEO and the Third Party from December 2005 to May 2007.

[4] Upon receipt of the journalist's request for records, BCLC gave the Third Party notice under s. 23 of FIPPA and invited him to comment on the possible disclosure of the records. After considering the Third Party's views, BCLC informed the journalist that it would release only one page of the records to him.

[5] The journalist requested that the Office of the Information and Privacy Commissioner ("OIPC") review BCLC's decision. During the review, BCLC changed its position and decided to release most of the requested information. The Third Party objected and requested the OIPC review BCLC's decision. In his request for review, the Third Party explained that his objection to disclosure was based on the following grounds:

1. The records are not within the scope of FIPPA (the "custody and control" issue, s. 3 of FIPPA).

2. If the records are within the scope of FIPPA, disclosure would be inconsistent with the purpose for which the information was obtained or compiled (the "privacy complaint" issue, ss. 32 and 34 of FIPPA).

3. If the records are within the scope of FIPPA, s. 21 (harm to third party business interests) and s. 22 (harm to personal privacy) apply so the records should not be disclosed.

[1] 2011 BCPIC No. 34.

[6] In Order F11-28, the Adjudicator declined to consider the first two issues because they had not been included in the Notice of Written Inquiry, the document by which the OIPC informs parties of the issues that will be adjudicated. He went on to find that BCLC was not required to withhold information under s. 21(1) but was required to withhold some information under s. 22(1).

[7] The Third Party applied for judicial review of Order F11-28. Madam Justice Fisher of the BC Supreme Court set aside the part of the order that declined to consider the first two issues, and she remitted them back to the Commissioner for a hearing.[2] She also stated that the Commissioner had the discretion to remit the Third Party's privacy complaint to investigation by the OIPC. The Commissioner has sent the privacy complaint to investigation,[3] therefore, the only issue before me in this inquiry is whether the records are within the scope of s. 3 of FIPPA.

[8] The Third Party, BCLC and the applicant were given the opportunity to provide additional written submissions and evidence for this new inquiry. BCLC, which did not make submissions in the initial inquiry, wrote to say that it continues to take no position regarding the custody and control issue and would not provide a submission. The Third Party explained that he is content to rely on his submissions and supporting affidavit evidence from the original inquiry. The applicant journalist provided no new submission or evidence.

[9] **Records**—The records consist of 47 pages of email correspondence between the CEO and the Third Party, for the period December 2005 to May 2007.

ISSUE

[10] The only issue is whether the responsive records are in the custody or under the control of BCLC within the meaning of s. 3(1) of *FIPPA*. Section 57 of FIPPA is silent regarding the burden of proof in cases involving s. 3(1). Previous decisions have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.[4] In this case, it is the Third Party, not the public body, who objects to disclosure and claims that the records are outside the scope of FIPPA. Therefore, the burden rests on the Third Party to prove his claim that the responsive records are not within the custody or under the control of BCLC.

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[2] Consent Order, BCSC No. S117399 (Vancouver Registry).
[3] OIPC File F12-51546.
[4] For example: Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 03-14, [2003] B.C.I.P.C.D. No. 14; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order No. 115-1996, [1996] B.C.I.P.C.D. No. 42.

Analysis

[11] There is no dispute in this inquiry that the responsive records are in BCLC's physical possession. Instead, the Third Party submits, "While the Records may be in the custody of the BCLC in a technical sense, they are not within the BCLC' custody or control within the meaning of s. 3(1) of the Act".[5] He references both s. 3(1) and 3(1)(g) as being relevant:

> **Scope of this Act**
>
> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...
>
> (g) material placed in the archives of a public body by or for a person or agency other than a public body;[6] ...

[12] FIPPA does not define the terms "custody" or "control". As has been noted by the Supreme Court of Canada and in many OIPC orders, the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, in harmony with the scheme of the legislation, the purposes of the legislation and the intention of the Legislature.[7]

[13] With that in mind, I first consider the use of the conjunction "or" in s. 3(1). In my view, this word indicates that either custody *or* control over a particular record will suffice to bring it within the scope of s. 3(1) and both are not required.[8] Therefore, I will examine whether BCLC has "custody" of the responsive records, within the meaning of s. 3(1). I will only go on to consider the issue of "control" if I find that the records are not in BCLC's "custody".

Meaning of "custody"

[14] I have reviewed what previous cases have to say about the meaning of the word "custody" and conclude that it means more than simple physical possession of a record. A public body must have some legal right or obligation to the information in its possession before it can be said to have "custody".

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[5] Third Party's initial submission, para. 27.

[6] Although I fail to see the relevance of s. 3(1)(g) to the facts of this case, I mention it because the Third Party includes it in para. 20 of his initial submission. He does not go on to explain its significance, or make any further submission on this point.

[7] *Lavigne* v. *Canada (Office of the Commissioner of Official Languages),* 2002 S.C.C. 53; and Order F10-13, [2010] B.C.I.P.C.D. No. 22, para. 29.

[8] This approach has also been followed in Ontario: Order PO-3009-F, [2011] O.I.P.C. No. 152, para. 90; *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[15] For example, in Order 02-30[9] former Commissioner Loukidelis found that while physical possession of a document is a strong indication of custody, a public body will only have custody if it has some legal right to deal with the records and some responsibility for their care and protection. In that case, the University of Victoria provided a variety of administrative and corporate secretariat services to the University of Victoria Foundation, which was responsible for managing donations received for the benefit of the University. Although the Foundation's records were located on campus, they were not integrated with the University's files in any way, and the Commissioner found that the University had no legal right to deal with them as it wished. Therefore, the fact that the University had physical possession of the disputed records was inadequate to give it "custody" for the purposes of FIPPA.[10]

[16] Similarly, in Order No. 308-1999,[11] former Commissioner Flaherty found that in order for a public body to have custody of records, it must have immediate charge and control of the records, including some legal responsibility for their safekeeping, care, protection or preservation. That case involved a diary kept by a Liquor Distribution Branch ("LDB") store manager recording her interactions with a customer. She only handed the diary over to her employer when asked to do so in response to an access request. Commissioner Flaherty agreed with LDB that physical possession of the diary was not, on its own, sufficient to establish custody. He found that "custody" requires more than the fact that the records happen to be located on the public body's premises. For example, he explained that a public body does not have "custody" of an employee's personal belongings such as a wallet, purse, diary or personal scheduler of non-work related activities simply because they are stored at work. In order for a public body to have custody for the purposes of FIPPA, it must have a legal right to obtain a copy of the records, including some legal responsibility for their safekeeping, care, protection or preservation. After reviewing the store manager's diary, the Commissioner concluded that it was created within the employment relationship for purposes related to the store manager's role, so LDB had a legal right to it. Therefore, LDB had "custody" for the purposes of FIPPA. On judicial review,[12] Madam Justice Shabbits agreed that in order to have custody of a record for the purposes of FIPPA, a public body must have the legal right to obtain a copy. However, on the facts of the case, she disagreed with the Commissioner that the diary was created in fulfillment of any employment duty, and she concluded that LDB did not have legal authority to obtain a copy.

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[9] Order 02-30, [2002] B.C.I.P.C.D. No. 30, at para. 21.
[10] He then went on to find that the records were also not under the control of the University.
[11] Order No. 308-1999, [1999] B.C.I.P.C.D. No. 21, p. 7.
[12] *British Columbia (Ministry of Small Business, Tourism & Culture) v. British Columbia (Information & Privacy Commissioner)*, 2000 BCSC 929.

[17] It appears that the Third Party agrees with the above understanding of "custody". He submits that s. 3(1) is not satisfied merely by the records being located on the premises of a public body; rather, the public body must have the "legal right" to obtain a copy of the records before it has custody or control under s. 3(1), and even then s. 3(1) only applies if they are "government" records.[13]

[18] Although the Third Party does not explain precisely what he means by the term "government" records, my understanding based on his submissions is that he is referring to records created in the course of an employee's duties, the content of which relates to the public body's mandate and functions, as opposed to personal information. For example, the Third Party submits, "I emailed [CEO] as a friend and not with the intention of corresponding with him in his capacity as the CEO of the BCLC."[14] He also submits that the responsive records "were produced as a result of email correspondence between two friends, completely outside the scope of the mandate or daily business operations of BCLC."[15]

Does BCLC have "custody"?

[19] The records in dispute are emails that were sent and received via the CEO's BCLC email account and most contain his BCLC signature block. There is no dispute that BCLC has physical possession of the records and was able to provide a copy for the purposes of the access request and inquiry. Therefore, absent any evidence or argument to the contrary, I conclude that the responsive records are physically stored in BCLC's email system where BCLC maintains and cares for them, along with the rest of its employees' email.

[20] The Third Party does not submit that BCLC has no legal right to access email stored on its email system in general. Rather, as I understand it, his argument is that BCLC has no legal right to access the *subset* of the CEO's email that consists of his communications with the Third Party because it is "purely personal correspondence."[16]

[21] I disagree that this is the correct approach. In my view, it would be unreasonable to find that BCLC only has a legal right to access some of the CEO's email, depending on their contents, when all his email are intermingled on

[13] Third Party's initial submission, para. 21.
[14] Third Party's affidavit, para. 23.
[15] Third Party's initial submission, para 25.
[16] Third Party's initial submission, para. 33.

the workplace system. Besides, how would BCLC know the contents of any particular email without accessing, opening and reading it? Furthermore, based on my review of the responsive records, I disagree with the Third Party that they contain "purely personal information". Several contain information that pertains to the functions of BCLC, the gaming industry and the CEO's professional role. The affidavit evidence also confirms that there is a work-related element to some of the emails. For example, the CEO explains that he found the Third Party to be a "valuable sounding board" for BCLC's various projects because he had a good business sense and they shared a mutual respect. The CEO adds that after the Third Party stepped down as chair of BCLC, the CEO continued to "bounce ideas off of him" and referenced BCLC matters, such as BCLC's sponsorship plans with VANOC and a proposed 2010 Olympic lottery.[17]

[22] In addition, the approach suggested by the Third Party would pre-empt or unduly restrict the application of FIPPA and run contrary to its purpose of making public bodies more accountable to the public by providing a right of access subject only to specified limited mandatory and discretionary exceptions. Those limited exceptions are spelled out in ss. 12 through 22.1 of FIPPA, and in the case of personal information, s. 22 provides the necessary protections from disclosure that would be harmful to personal privacy. Further, the Legislature has already delineated the types of information that should be excluded from the scope of FIPPA and they are listed in s. 3(1)(a) through (k). Personal information and what the Third Party describes as "purely personal correspondence" are not included in that list.

[23] As noted at the beginning of the analysis, the Third Party asserts that s. 3(1)(g) plays a role in this case. Section 3(1)(g) states that FIPPA does not apply to material placed in the archives of a public body by or for a person or agency other than a public body. I fail to see the applicability of s. 3(1)(g) to the facts of this case, and the Third Party does not explain in either his submissions or evidence. Therefore, I find that s. 3(1)(g) does not apply.

CONCLUSION

[24] In conclusion, I find that BCLC does have a legal right to the responsive records and, therefore, it has "custody" of them within the meaning of s. 3(1). Given that the records are in BCLC's custody, it is unnecessary to determine whether they are also under its control.

[17] CEO's affidavit, paras. 4, 7, and 8. The CEO points out that this VANOC information is now part of the public record.

ORDER

For the reasons given above, I make the following order under s. 58 of the Act:

1. I require BCLC to comply with Order F11-28 on or before **December 20, 2013**, and, concurrently, to provide me a copy of its cover letter and the records sent to the applicant.

November 7, 2013

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

OIPC File No.: F11-45285